83-5339

Office-Supreme Court, U.S.
FILED
SEP 21 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

September Term, 1983

No. 83-

DENNIS DICK,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

THOMAS J. MCHUGH, JR.
P. O. Box 535
Fayetteville, Georgia 30214

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the summary denial of Petitioner's extraordinary motion for new trial based on duly discovered evidence violated Petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States?

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IN THE

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STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

Petitioner Dennis Dick respectfully prays that a writ of Certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is attached hereto as appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered June 1, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States, which provides relevant part:

"No person shall be held to answer for capital, or otherwise infamous crime...nor be deprived of life, liberty, or property, without due process of law...."

2. This case involves the Sixth Amendment to the Constitution of the United States, which provides relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

3. This case involves the Eighth Amendment to the Constitution of the United States, which provides relevant part:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

4. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides relevant part:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Petitioner Dennis Dick, respectfully shows the Court that he was convicted for the offense of murder and armed robbery in

direct appl ended 6/22/81

the Superior Court of Dawson County, Georgia and sentenced to death on October 26, 1979. His convictions were confirmed on direct appeal to the Supreme Court of Georgia. Dick v. State, 246 Ga. 697, cert. denied, 451 U.S. 951, 68 L.Ed.2d 357 (1981). Rehearing was denied on June 22, 1981.

Subsequently, Petitioner's Counsel in the lower Court received a letter from one Billy Webster indicating that Dennis Dick, your Petitioner, had been involuntarily drugged on the evening of the murder for which he was convicted. Mr. Webster had likewise been charged with the offense of murder in the same incident, however, after trial by jury, he was acquitted. Mr. Webster's letter indicated that the drugging had taken place at the contrivance of one Chris Hoerner. Mr. Hoerner like Mr. Webster and your Petitioner was tried for the offense of murder and received a life sentence thereon. Petitioner subsequently filed an extraordinary motion for new trial based on newly discovered evidence and the same was summarily denied without hearing by the lower Court. The denial of the extraordinary motion for new trial was upheld by the Supreme Court of Georgia. Dick vs. State 248 Ga. 898 (1982).

New info

On April 20, 1982, the Superior Court of Butts County, Georgia entered an Order staying execution thereby allowing your Petition to proceed with his Petition of Writ of Habeas Corpus which had been filed the day prior. The State sought and obtained a certificate of immediate review which led to a denial by the Supreme Court of Georgia in Zant vs. Dick, Case No. 38783. Pursuant to the decision rendered therein, the case

State habeas

what was exec. date?

was remanded for further proceedings.

On October 18, 1982 and evidentiary hearing was held on the Motion for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia. Motions for Writ of Habeas Corpus ad Testificandum as to Chris Hoerner and motions for seeking expenses for expert witnesses were overruled. Testimony was then taken from Billy Webster which corroborated the allegations that your Petitioner had been involuntarily drugged on the evening of the murder. Notice of appeal from an adverse ruling was filed on November 29, 1982. Upon consideration, the Supreme Court of Georgia in its Order dated February 4, 1983 remanded the case to the trial Court with direction that a Writ of Habeas Corpus ad Testificandum issue to secure testimony of Chris Hoerner. On March 14, 1983 pursuant to the direction of the Supreme Court of Georgia, the testimony of Chris Hoerner was received. In that hearing, Chris Hoerner testified that on the date of June 2, 1979 that he secretly administered two capsules of a drug which he believed to be Turinol to Dennis Dick by secreting them in the can of beer that was consummed by Dennis Dick. (T-7,8)

Mr. Hoerner's testimony indicated that subsequent to ingesting the beer with the secreted capsules, Dennis Dick's behaviour became suddenly erratic and he "acted like a mad man." (T-10)

Mr. Hoerner's testimony confirmed the allegations and testimony by Mr. Billy Webster that at the time of the shooting Dennis Dick was experiencing "unusual behaviour, other than one who would be intoxicated."

"He was in a rage."
"He was out of it. He was out of touch with reality."

(T-25)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Upon receipt of the letter of Mr. Billy Webster, dated 3-6-81, Counsel proceeded to attempt to locate Mr. Webster in order to corroborate the allegations made by him concerning the involuntary intoxication of Dennis Dick. When the same was accomplished, the extraordinary motion for new trial, which has given rise to the issues herein presented, was filed in the Superior Court of Butts County, Georgia. Your Petitioner has since thereafter in his pleadings and arguments before the lower Court raised the issue of violation of rights guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. (T-108) During the intitial hearing on the Writ of Habeas Corpus the Constitutional issues were raised and preserved in the pleadings and argument. (T-113)

The Habeas Court after hearing determined that denial of his extraordinary for new trial was not violative of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, concluding that the affects of any such involuntary drugging of Dennis Dick on the night in question would be speculative.

The Supreme Court of Georgia subsequently on June 31, 1983 denied your Petitioner's Application for a Certificate of Probable Cause to Appeal filed in the case.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DENIAL OF THE EXTRAORDINARY MOTION FOR NEW TRIAL VIOLATED YOUR PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The facts in this case create an important question that has not been previously addressed by this Court, to wit, whether or not one convicted of a crime who subsequently learns that he was involuntarily intoxicated or drugged at the time of the commission of the crime for which he has been convicted, is entitled to a new trial wherein such evidence of such involuntary intoxication may be raised.

Pursuant to the laws of the State of Georgia, as codified as Georgia Code Ann. Section 27-704, "A person shall not be found guilty of a crime when at the time of the act...constituting the crime, such person because of involuntary intoxication, did not have sufficient mental capacity to distinguish between right and wrong in relation to such act. Involuntary intoxication means intoxication caused...by the coercion, fraud, artifice, or contrivance of another person."

Under the facts in the case being brought before the Court, Petitioner Dennis Dick learned of facts which not only

There was a voluntary confession

would have afforded a basis upon which the triers of fact could have reached a conclusion different from that reached in the guilt-innocence phase , but which could have had a profound effect if introduced during the sentencing phase of his case. Further, the facts discovered subsequent to his conviction and corroborated during the hearings below offer Petitioner a total and complete defense to the charges made against him.

Just as it is virtually impossible for your Petitoner to guarantee that if afforded a new trial that he would be acquitted or receive a less harsh verdict, so too, it is equally impossible for the Court below to determine that in light of the newly discovered evidence no change in the outcome would be forthcoming. The principle that should then guide the Court particularly in a capitol case is to weigh the balance of the cost to the state to provide another trial against the tragedy of imprisoning and/or executing an innocent man.

In this case, the trial Court summarily denied the extraordinary motion for new trial without a hearing on the merits. Upon what set of facts did the Court exercise its discretion? When newly discovered evidence which otherwise meets all of the criteria for granting of new trial might well result in a different verdict, it is the duty of the Court to grant a new trial to permit a jury to find a true verdict. U.S. v. Mitchell, 29 F.R.D.157 (1962).

got a hearing

This case is distinguished from those cases in which the newly acquired evidence consists of a new legal theory. U.S. v. Hoffa, 390 U.S. 924 (1965); U.S. v. Hamling, 424 U.S. 911 (1975).

Only if TJ feels could not result in diff verdict

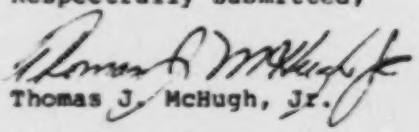
In the present case there has been discovered competent evidence which is not only material to the issue of competency of the defendant at the time of the crime, but further provides the accused with a total defense to the charges. The Due Process provisions and the prohibitions of cruel and unusual punishment of the Constitution mandate the granting of a new trial in this matter.

If a state wishes to authorize capital punishment it has a constitutional responsibility to avoid the arbitrary and capricious infliction of the death penalty. Godfrey v. Georgia, 446 U.S. 420 (1980).

CONCLUSION

Petitoner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,



Thomas J. McHugh, Jr.

P.O. Box 535

Fayetteville, Georgia 30214

Attorney for Petitioner

August 31,1983

Atlanta, Georgia

EXHIBIT "A"

Application No. 2483

SUPREME COURT OF GEORGIA

ATLANTA, June 1, 1983

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DENNIS DICK V. ROBERT FRANCIS, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, C.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the annexed petition for writ of certiorari on respondent by depositing a copy thereof in the United States mail, first class mail,postage prepaid addressed as follows:

Mr. William B. Hill
Assistant Attorney General
State of Georgia
132 State Judicial Building
40 Capitol Square S.W.
Atlanta, Georgia 30334

This day of August 31, 1983.

Thomas J. McHugh, Jr.
P.O. Box 535
Fayetteville, Georgia 30214

Office-Supreme Court, U.S.
FILED
SEP 21 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1983

DENNIS DICK,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, by and through his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to Supreme Court of the State of Georgia without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A." Petitioner shows the Court respectfully that the application will be supplemented with such additional affidavits as may be required by the Court.

Respectfully submitted,

ATTORNEY FOR PETITIONER

AFFIDAVIT

STATE OF GEORGIA

COUNTY OF FULTON

Before me the undersigned, an officer authorized by law to administer oaths, appeared Thomas J. McHugh, Jr., who being duly sworn deposes and says as follows:

I am member in good standing of the Bar of the State of Georgia;

I am attorney of record for Applicant Dennis Dick;

I have agreed to represent Applicant without fee or remuneration of any kind;

I have personal knowledge of Applicant's financial circumstances and have determined that he is without funds or resources to bring this action;

I have made this affidavit because sufficient time does not exist to obtain the Affidavit of Poverty of Dennis Dick;

Applicant is known by affiant to be currently in the custody of the State of Georgia at the Georgia Diagnostic and Classification Center, Jackson, Georgia;

Applicant has made Affidavits of Poverty on prior occassions and that his financial condition has not changed since the time of making such affidavits.

Thomas J. McHugh, Jr.

Signed and Sworn before me,
this day of August 30, 1983.

Notary Public, Georgia, State at Large
My Commission Expires Nov. 16, 1985

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OCT 13 1983
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1983

83-5339

DENNIS DICK,

Petitioner,

-v-

STATE OF GEORGIA,

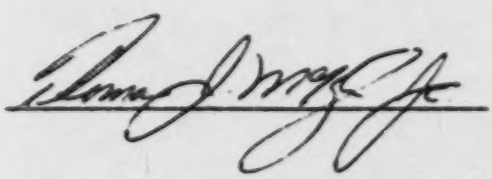
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, by and through his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to Supreme Court of the State of Georgia without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A."

Respectfully submitted,



ATTORNEY FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1983

DENNIS DICK

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Dennis Dick, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to relief.

1. Are you presently employed? Yes ___ No ✓

a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer is "no," state the date of last employment and the amount of salary and wages per month which you received. I've been confined since 1979

2. Have you received within the last twelve months any money from any of the following sources?

a. Business, profession or form of selfemployment?

Yes ___ No ✓

b. Rent payments, interest or dividends?

Yes ___ No ✓

c. Pensions, annuities or life insurance payments?

Yes ___ No ✓

d. Gifts or inheritances?

Yes ___ No ✓

e. Any other sources?

Yes ___ No ✓

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own cash, or do you have money in checking or savings account?

Yes ___ No ✓ (Include any funds in prison accounts.)

If the answer if "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ___ No ✓

If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

I have 1 child, but have been unable to support him.

I understand that a false statement or no answer to any questions in this affidavit will subject me to penalties for perjury.

Lonnie Dick

STATE OF GEORGIA
COUNTY OF Butts

Lonnie Dick, Being first duly sworn under oath, presents that he had read and subscribed to the above and states that the information therein is true and correct.

Lonnie Dick

Subscribed to and sworn to before me,
this the 14 day of September, 1983.

Notary Public

My Commission expires:

December 14, 1984

Office-Supreme Court, U.S.
FILED
OCT 6 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-5339

IN THE
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OCTOBER TERM, 1982

DENNIS DICK,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

Respectfully submitted,

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General
Counsel of Record for the Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

SUSAN V. BOLEYN
Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3359

QUESTION PRESENTED

1.

Whether this Court should grant a writ of certiorari to examine the denial of Petitioner's extraordinary motion for a new trial, when an examination of the decisions of the state courts below makes it readily apparent that the denial of the same was squarely, clearly and adequately based on nonfederal grounds, i.e., the failure of Petitioner to comply with state law.

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DENNIS DICK,

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v.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

PRIOR PROCEEDINGS

The Petitioner, Dennis Dick, was convicted of murder and armed robbery on October 26, 1979 upon Indictment No. 79-3 in the Superior Court of Dawson County, Georgia. Respective sentences of death and a consecutive sentence of life imprisonment were imposed on October 27, 1979.

Petitioner's convictions and sentences were affirmed at Dick v. State, 246 Ga. 697, 273 S.E.2d 124, cert. denied, 451 U.S. 976 (1981).

From the denial of relief on direct appeal Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, which petition bore Civil Action No. 5181.

By notice dated September 29, 1981 Petitioner voluntarily dismissed the aforementioned habeas petition in order that he might be able to pursue an extraordinary motion for a new trial in the court of conviction.

By a decision dated February 9, 1982 at Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982) the Supreme Court of Georgia affirmed the trial court's decision denying Petitioner's extraordinary motion for a new trial.

By Order dated April 8, 1982 the Superior Court of Dawson County rescheduled Petitioner's date of execution for April 23, 1982.

The aforementioned April 8, 1982 Order rendered by the court of conviction prompted Petitioner to file a second petition for a writ of habeas corpus in the Superior Court of Butts County on April 19, 1982. On April 20, 1982 the Superior Court of Butts County rendered an Order staying Petitioner's execution.

On April 20, 1982 the Superior Court of Butts County granted the respondent warden's application for a certificate of immediate review of the Butts County habeas court's Order staying Petitioner's then scheduled April 23, 1982 execution.

By decision dated September 9, 1982 at Zant v. Dick, 249 Ga. 799, 294 S.E.2d 508 (1982) the Supreme Court of Georgia found that the state habeas court did not abuse its discretion in granting Dick's request for a stay of execution.

After conducting evidentiary hearings on Petitioner's application for state habeas relief, the Superior Court of Butts County, sitting as a habeas court, rendered its Orders on November 1, 1982 and April 6, 1983 denying Petitioner habeas relief.

By Order dated June 1, 1983 the Supreme Court of Georgia, upon Application No. 2483, denied Petitioner's application for a certificate of probable cause to appeal the habeas court's denial of state habeas relief.

It is from the aforementioned June 1, 1983 Order rendered by the Supreme Court of Georgia that Petitioner seeks the issuance of the requested writ of certiorari.

Further facts may be developed herein as necessary for a more thorough illumination of the issue presented to this Court for resolution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. BECAUSE THE DENIAL OF PETITIONER'S EXTRAORDINARY MOTION FOR A NEW TRIAL WAS SQUARELY AND CLEARLY BASED ON NONFEDERAL GROUNDS, i.e., THE FAILURE TO COMPLY WITH STATE LAW, THIS COURT SHOULD NOT GRANT THE REQUESTED WRIT.

On this application for a writ of certiorari Petitioner contends that the writ should issue as the denial of his extraordinary motion for a new trial allegedly violated, in some manner unspecified on this instant application, his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. For this Court's convenience, attached hereto as Respondent's Appendices 1 through 4 are the following decisions of the state courts below:

(1) Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982). Supreme Court of Georgia's affirmance of the trial court's denial of the extraordinary motion for a new trial.

(2) Dick v. Francis, No. 5515 (Sup.Ct. Butts Cty., decided Nov. 1, 1982). Paragraphs 14 through 16 address the denial of Petitioner's extraordinary motion for a new trial.

(3) Dick v. Francis, No. 5515 (Sup.Ct. Butts Cty., decided April 6, 1983). Addendum to the earlier November 1, 1982 Order, again addressing the denial of Petitioner's extraordinary motion for a new trial.

(4) Dick v. Francis, App. No. 2483 (Ga.S.Ct., denied June 1, 1983). Denial of application for a certificate of probable cause to appeal.

An examination of the foregoing decisions readily reveals that the denial to Petitioner of relief on his extraordinary motion for a new trial, both on direct appeal and in collateral attack in state habeas corpus, has been firmly and clearly grounded upon Petitioner's failure to comply with state law. No state court has addressed nor decided Petitioner's claim on anything other than this adequate and independent nonfederal ground.

With the foregoing in mind, Respondent notes that this Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent nonfederal or state ground, even though a federal question may be involved and perhaps wrongly decided. Berea College v. Kentucky, 211 U.S. 45, 53 (1908). Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state courts after we corrected its views of Federal Laws, our review would amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977).

It is the Respondent's contention that there exists no federal question for review by this Court. An examination of the foregoing authorities, and the decisions rendered by the state courts, readily reveals that the decision sought to be reviewed on this instant application for a writ of certiorari is clearly and adequately grounded upon state law, as opposed to federal law. Accordingly, there exists no federal question for review and this instant application for a writ of certiorari should be denied.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that there exists no federal question for review by this Court as the denial to Petitioner of relief upon his extraordinary motion for a new trial, both on direct appeal and in collateral attack in state habeas corpus, has been clearly and squarely based on nonfederal grounds, i.e., the failure to comply with state law.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

MARION O. GORDON
First Assistant Attorney General

SUSAN V. BOLEYN
Assistant Attorney General

WILLIAM B. HILL, JR.
Senior Assistant Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3359

CERTIFICATE OF SERVICE

I, William B. Hill, Jr., Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon counsel for the Petitioner by depositing one copy of the same in the United States mail, with proper address and adequate postage to:

Mr. Thomas J. McHugh, Jr.
Attorney at Law
P. O. Box 535
Fayetteville, Georgia 30214

This 4th day of October, 1983.

WILLIAM B. HILL, JR.
Senior Assistant Attorney General

beyond necessity.

I am authorized to state that Justice Smith joins in this concurrence.

38103. DICK v. THE STATE.

HILL, Presiding Justice.

The defendant, Dennis Dick, was convicted in 1979 of the murder and armed robbery of O. C. (Red) Rider. His convictions and death sentence for murder and life sentence for armed robbery were affirmed by this court in *Dick v. State*, 246 Ga. 697 (273 SE2d 124) (1980), cert. denied 451 U. S. 976 (101 SC 2059, 68 LE2d 357).

On September 17, 1981, the defendant filed an extraordinary motion for new trial based on newly discovered evidence. The motion recited in conclusory fashion that the evidence was material, not merely cumulative or impeaching in nature and had only been recently acquired, that there was no want of diligence in acquiring it sooner, and that it would probably produce a different result in the case. The motion itself did not state what the new evidence was.

An affidavit from the defendant's attorney accompanied the motion. The affidavit stated that the attorney had agreed to represent the defendant on July 20, 1981, that on July 21, 1981, he was provided with a copy of a letter from Billy Webster, a co-conspirator, which "indicates" that the defendant had been "involuntarily drugged" on the night of the crimes, and that Webster had left the state and his whereabouts had only recently been discovered.[1] The copy of the letter from Webster was not attached to the affidavit.

The trial court refused to issue a rule nisi and denied the motion without a hearing. The defendant appeals this summary denial and the only question for our determination is whether the defendant's pleadings (the motion and the affidavit) were sufficient to require the trial court to hold a hearing on the merits of the motion.

1. At the outset, we note that there is a distinction between a motion for new trial and an extraordinary motion for new trial. A

---

[1] The evidence at defendant's trial showed that the defendant and Billy Webster and Christopher Hoerner committed the crimes. Hoerner was sentenced to life in a separate trial, *Hoerner v. State*, 246 Ga. 374 (271 SE2d 458) (1980), and Webster, who was also tried separately, was acquitted. Neither Webster nor Hoerner testified at this defendant's trial.

motion for new trial is one made "within 30 days of the entry of the judgment on the verdict, or entry of the judgment where the case was tried without a jury." Code Ann. § 70-301. An extraordinary motion for new trial is one made after the time for filing a motion for new trial has expired. See Code Ann. §§ 70-301, 70-303.[1]

"Extraordinary motions for a new trial are not favored, and a stricter rule is applied to an extraordinary motion for a new trial based on the ground of newly available evidence than to an ordinary motion on that ground." *Wallace v. State*, 205 Ga. 751 (2) (55 SE2d 145) (1949). Accord, *Music v. State*, 244 Ga. 832, 833 (262 SE2d 128) (1979). Thus, although we have held that under our Code the trial court is required to hold a hearing on a motion for new trial, *Shockley v. State*, 230 Ga. 869 (199 SE2d 791) (1973); *Foster v. State*, 230 Ga. 870 (199 SE2d 790) (1973), we have also held that an extraordinary motion for new trial which fails to show any merit may be denied without the necessity of a hearing. *Fulford v. State*, 222 Ga. 846, 847 (152 SE2d 845) (1967); *Harris v. Roan*, 119 Ga. 379 (5) (46 SE 433) (1903); see also *Sinkfield v. State*, 232 Ga. 892 (209 SE2d 188) (1974). Rubenstein v. United States, 227 F2d 538 (10th Cir. 1955), cert. denied 350 U. S. 993, cited by the defendant for the proposition that it is error to refuse a hearing on a motion based on newly discovered evidence, dealt with a motion which alleged facts sufficient to state a claim for relief and, therefore, is inapposite.

2. There being no statutory requirements as to extraordinary motions for new trial (see fn. 2), the procedural requirements for such motions are the product of case law. These procedural requirements have not been modified by the notice pleading provisions of the Civil Practice Act, Code Ann. § 81A-108, because the CPA is not applicable to criminal cases. See *Jordan v. State*, 247 Ga. 328, 331 (276 SE2d 224) (1981). Therefore, if the pleadings in an extraordinary motion for new trial in a criminal case do not contain a statement of *facts* sufficient to authorize that the motion be granted if the facts developed at the hearing warrant such relief, it is not error for the trial court to refuse to conduct a hearing on the extraordinary motion.

The requirements for granting an extraordinary motion for new

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[1] There is no affirmative statutory authority in Georgia for extraordinary motions for new trial. Instead, they are authorized indirectly by Code Ann. §§ 70-301 ("[a]ll applications for new trial, except in extraordinary cases, shall be made within 30 days. . . .") and 70-303 ("[w]henever a motion for a new trial shall have been made at the term of trial in any criminal case and overruled, or when a motion for a new trial has not been made at such term, no motion for a new trial from the same verdict shall be made or received, unless the same is an extraordinary motion or case, and but one such extraordinary motion shall be made or allowed.")

trial are clear. "On [an extraordinary] motion for a new trial based on newly discovered evidence, it is incumbent on the movant to satisfy the court: (1) that the newly discovered evidence has come to his knowledge since the trial; (2) that want of due diligence was not the reason that the evidence was not acquired sooner; (3) that the evidence was so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence accounted for; and (6) that the new evidence does not operate solely to impeach the credit of a witness. *Bell v. State*, [227 Ga. 800, 805 (183 SE2d 357) (1971)]; *Timberlake v. State*, 246 Ga. 488, 491 (271 SE2d 792) (1980)." *Tanner v. State*, 247 Ga. 438, 443 (276 SE2d 627) (1981). "Implicit in these six requirements is that the newly discovered evidence must be admissible as evidence." *Timberlake v. State*, supra, 246 Ga. at 491. An extraordinary motion for new trial and its accompanying affidavits must set forth *facts* satisfying these requirements; conclusions of counsel will not suffice. The defendant's pleadings in this case do not show facts satisfying the first, second, third or fifth requirements, or the overriding requirement that the newly discovered evidence be admissible.

We consider the first and second requirements together in this case. The attorney's affidavit states that he was provided with the Webster letter on July 21, 1981, the day after he agreed to represent the defendant. That affidavit does not contain a copy of the letter and does not set forth the date of the letter or the name of the addressee. So far as the motion and affidavit show on their face, the letter may have been known to the defendant or his previous counsel for a considerable period of time. More importantly, there is no affidavit from the defendant saying when he first learned he was "involuntarily drugged." A "mere assertion that the evidence could not have been discovered by ordinary diligence is insufficient." (Cits.) *Timberlake v. State*, supra, 246 Ga. at 492.

The third requirement is not satisfied by conclusions of counsel. While voluntary intoxication is not an excuse for criminal acts, involuntary intoxication is a defense if the defendant did not have sufficient mental capacity to distinguish between right and wrong. Code § 26-704. The evidence showed that the defendant had been drinking on the night of the crimes (246 Ga. at 697-698). Defendant's defense at trial was prolonged voluntary drunkenness causing insanity (246 Ga. at 702-703). Yet his confession and testimony at trial showed that he recalled commission of the crimes. He has failed to show on this record how the alleged consumption of drugs without his knowledge affected his voluntary behavior or would probably produce a different verdict.

The defendant's attorney's statement by affidavit that "said Billy Webster has left the State of Georgia and that his whereabouts have only been learned on this date" does not satisfy the fifth requirement, an affidavit from Webster himself or its absence accounted for. Webster might now repudiate or disavow any "indications" contained in the letter that the defendant was "involuntarily drugged." Thus, in order to insure that there were sufficient grounds upon which to base an extraordinary motion for new trial which would not be merely frivolous, the motion should have set forth facts showing the prospects for obtaining Webster's statements under oath.

Finally, the defendant's pleadings fail to show that the newly obtained evidence would be admissible as evidence if a new trial were to be granted. We repeat, Webster's letter was not included with the pleadings. Does it say that Webster slipped drugs into the defendant's drinks, or does it say that Hoerner told Webster that he (Hoerner) slipped drugs into the defendant's drinks? Thus, for all the trial judge knew the contents of the letter and any testimony from Webster would be inadmissible hearsay.

" 'It is *incumbent on a party who asks for a new trial* on the ground of newly discovered evidence *to satisfy the court* ...' as to each of the six requirements." (Cits.) *Timberlake v. State*, supra, 246 Ga. at 491, and the trial court's denial of the motion will not be reversed absent an abuse of discretion. E.g., *Drake v. State*, 248 Ga. 891 (1982); *Music v. State*, supra, 244 Ga. at 833; *Brannon v. State*, 190 Ga. 203, 205 (9 SE2d 152) (1940). In light of the defendant's failure to plead facts satisfying the six requirements, we cannot say that the trial court abused its discretion in refusing to conduct a hearing on the extraordinary motion for new trial.

3. Contrary to the defendant's contention, his due process and equal protection rights were not violated by the trial court's summary denial of his extraordinary motion for new trial when he failed to comply with the procedural requirements of state law.

4. In adhering, as we do today, to strict pleading requirements as to extraordinary motions for new trial, we are aware that this same matter may reappear on habeas corpus as an attack on the effectiveness of counsel, and that judicial economy might suggest that a hearing be required on all extraordinary motions for new trial. However, in order to prevail on habeas corpus it will be necessary to show that counsel was able to plead sufficient facts so as to prevail; i.e., it will be necessary to show that a new trial based on newly discovered evidence was warranted. Moreover, if we were to adopt a notice pleading approach to extraordinary motions with a hearing required in each instance, the penalty of death could be postponed

simply by a conclusory motion alleging newly discovered evidence filed at the last minute, thereby necessitating a hearing and postponement of the carrying out of the sentence. Therefore, strict pleading will continue to be required so that the judge to whom the motion is presented can readily ascertain whether a new trial based on newly discovered evidence is warranted or unwarranted.

Judgment affirmed. All the Justices concur.

DECIDED FEBRUARY 9, 1982.

Extraordinary motion for new trial. Dawson Superior Court. Before Judge Palmour.

Thomas J. McHugh, for appellant.

Jeff C. Wayne, District Attorney, Michael J. Bowers, Attorney General, for appellee.

38082. MUSGROVE et al. v. LONG.

WELTNER, Justice.

This is an appeal from the grant of a directed verdict in favor of the defendant in an action for specific performance. The parties entered into a contract which provided: "The exclusive option granted hereunder shall be exercised by Grantees at any time prior to January 31, 1974 by Grantees giving to Grantor at least thirty (30) days notice in writing of their intention to purchase the above-described real property. In the event Grantees elect to exercise this option the sale of the above-described property shall be closed during the month of January, 1974."

The grantee of the option deposited in the mail a written notice of intention to exercise the option, which was postmarked on January 1. The trial judge directed a verdict against the grantee, apparently finding that the notice of intention to exercise the option was not timely.

The issue in the case is, therefore, whether or not the exercise of the option is effective upon the mailing of notice of intent to exercise, or upon the receipt of such notice.

The factual situation of this case is reminiscent of first lessons in law school, and it is surprising that we have been unable to find any authority in our State which is directly on point. While some jurisdictions have adopted the former alternative (see Chanoff v. Fiala, 440 Pa. 424 (271 A2d 285, 288) (1970); Shubert Theatrical Co. v. Rath, 271 F 827 (2d Cir. 1921); Barnebey v. Barron G. Collier, Inc., 65

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IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

DENNIS DICK,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	NO. 5515
	:	
ROBERT FRANCIS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Dawson County. Petitioner was convicted of murder and armed robbery. He received a death sentence for murder and a life sentence for armed robbery. His convictions and sentences were affirmed on direct appeal. Dick v. State, 246 Ga. 697 (1980). Certiorari was denied by the Supreme Court of the United States. Petitioner had filed a petition for writ of habeas corpus in this Court but voluntarily dismissed the action on September 22, 1981, to pursue an extraordinary motion for new trial in Dawson Superior Court. The trial court denied the motion; the denial was affirmed by the Supreme Court. Dick v. State, 248 Ga. 898 (1982).

The petition contains 33 numbered paragraphs, of which

24 allege substantive claims for relief (10-33). The Court will address these claims for relief by paragraphs corresponding numerically to the paragraphs in the petition.

The record in this case consists of the transcript of proceedings before this Court on October 14, 1982, and the record and transcript of Petitioner's trial in the Dawson Superior Court.

10-13

In paragraphs 10-13, Petitioner alleges that the introduction of his statements into evidence at trial violated his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights and rights under the Georgia Constitution because the statements were the product of an illegal arrest made without probable cause.

FINDINGS OF FACT

The Supreme Court has already concluded that the confession was freely and voluntarily given so that its admission was not error. Dick v. State, 246 Ga. at 700-701.

CONCLUSIONS OF LAW

Findings of the Supreme Court are binding upon this Court for the purposes of review. Elrod v. Ault, 231 Ga. 750 (1974); Brown v. Ricketts, 233 Ga. 809 (1975).

Petitioner has not shown that his arrest was illegal or lacked probable cause.

Accordingly, this claim for relief is found to be without merit.

14-16

In paragraphs 14-16, Petitioner contends that the

denial of his extraordinary motion for new trial violated his Sixth, Eighth, and Fourteenth Amendment rights and rights under the Georgia Constitution.

FINDINGS OF FACT

The Supreme Court affirmed the denial of the extraordinary motion for new trial for failure to comply with procedural requirements. Dick v. State, 248 Ga. 898 (1982).

CONCLUSIONS OF LAW

At the habeas hearing Co-Defendant Billy Webster testified that Co-Defendant Chris Hoerner gave Petitioner some type of drug, without Petitioner's knowledge, on the night of the incident. Mr. Webster did not come forward with this evidence until some two years after Petitioner's trial.

Petitioner has claimed he was denied effective assistance of counsel by the failure of his attorney to raise this issue of involuntary intoxication at trial. The Court cannot hold defense counsel ineffective for not advancing a defense about which he knew nothing.

In passing on the extraordinary motion, the Supreme Court noted that in order to prevail on habeas corpus, counsel for Petitioner would have to show that a new trial based on the newly discovered evidence was warranted. Dick v. State, 248 Ga. at 901. Thus, counsel for Petitioner must satisfy this Court: (1) that the newly discovered evidence has come to his knowledge since the trial; (2) that want of due diligence was not the reason that the evidence was not acquired sooner; (3) that the evidence was so material that it would probably produce a different verdict;

(4) that it is not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence accounted for; and (6) that the new evidence does not operate solely to impeach the credit of a witness. Bell v. State, 227 Ga. 800, 805 (1971); Timberlake v. State, 246 Ga. 488, 491 (1980). "Implicit in these six requirements is that the newly discovered evidence must be admissible as evidence." Timberlake v. State, supra, at 491.

It is clear that counsel for Petitioner has not satisfied the third requirement as well as the overall requirement that the newly discovered evidence be admissible.

Counsel for Petitioner has not demonstrated that the newly discovered evidence of involuntary intoxication would probably produce a different verdict. Petitioner by his own admission had been drinking on the day in question. While involuntary intoxication is ordinarily a viable defense, its impact in this case is speculative when coupled with the evidence of Petitioner's alcohol consumption.

Moreover, the testimony of Co-Defendant Webster consisted solely of statements Co-Defendant Hoerner made to him. Webster did not see Hoerner administer any pills to Petitioner. Webster only knew what Hoerner later told him about having given some pills to Petitioner. Thus, the testimony of Webster is not admissible evidence; it is inadmissible hearsay. It is well-settled in Georgia law that declarations to third persons against the declarant's penal interest are not admissible in favor of the accused at his trial. Lyon v. State, 22 Ga. 399 (1857); Johnson v. State, 188 Ga. 662 (1939); Timberlake v. State, supra, at 492.

In that Petitioner has not satisifed all six requirements to warrant a new trial on the newly discovered evidence, the claim for relief in paragraphs 14-16 is found to be without merit.

17

The Supreme Court has already concluded that the trial court did not abuse its discretion in allowing the daughter and son of the victim to remain in the courtroom and assist the prosecution during voir dire. Dick v. State, 246 Ga. at 702(6).

18

In paragraph 18, Petitioner contends that he was denied his Sixth Amendment right to effective assistance of counsel.

FINDINGS OF FACT

Petitioner was represented at trial and on appeal by J. Max Davis of Decatur, Georgia. Counsel was admitted to the Bar in 1969. His practice has primarily been in civil law although he has tried some criminal cases. He had never tried a murder case prior to Petitioner's trial. Counsel had previously represented Petitioner's brother in a personal injury case in which he made a lot of money and had also handled a case for Petitioner's father. Counsel felt obligated to take Petitioner's case because they needed him. Counsel was paid $1,000.00 for the trial. He was appointed to handle the appeal and was never paid for it.

Counsel was retained shortly after the incident. He talked with Petitioner two or three times prior to arraignment.

He also talked with the two Co-Defendants who were in cells adjacent to Petitioner's. He had requested permission from their attorneys to interview the Co-Defendants extensively, but their lawyers refused. Counsel interviewed everyone he could find, including most of the State's witnesses. He was given access to the district attorney's file. He reviewed extensively the autopsy and ballistics reports.

Counsel testified that his defense strategy had to be developed after the Jackson-Denno hearing, at which hearing he learned of a possible insanity by intoxication defense. Counsel had not been aware of Petitioner's drinking until the Jackson-Denno hearing. Counsel knew that Petitioner was in withdrawals when he first interviwed him, but Counsel did not think too much of it at the time. Later, however, he realized there might be an insanity defense related to the alcohol. Counsel brought out Petitioner's history of chronic alcoholism in both phases of trial through the testimony of family members.

Counsel thought Petitioner was competent to stand trial. He did not request a psychiatric or psychological examination of Petitioner. He knew that Petitioner had never been hospitalized or treated for psychiatric problems.

Counsel testified that he did the best he could possibly do with the time that he had. He stated that he could have used more time but was prepared for trial. There is no helpful evidence of which he is aware that was not presented.

Counsel filed numerous pretrial motions. (R. 33-45).

He also filed requests to charge, including one on insanity by intoxication. (R. 21-28). At trial, Counsel conducted an extensive voir dire (T. 151-952); gave an opening statement (T. 1078-1080); cross-examined State witnesses (T. 1099; 1110; 1119; 1138; 1144; 1162; 1176; 1189; 1190; 1283; 1324); made motions (T. 952-53; 1201-02; 1263; 1330; 1371; 1408; 1506; 1508); presented two defense witnesses including Petitioner (T. 1338; 1381); gave closing argument in the guilt/innocence phase (T. 1430-1439); presented two witnesses in the sentencing phase (T. 1477; 1483) and gave closing argument (T. 1515-1529).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974); Fortson v. State, 240 Ga. 5 (1977).

Counsel here easily meets the test. He prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and the lack of material with which to work. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has complained of Counsel's failure to object to the prosecution's introduction of evidence regarding Petitioner's prior conviction for statutory rape.

in that the Supreme Court has held this evidence admissible, Dick v. State, 246 Ga. at 706, the Court cannot hold Counsel ineffective for failing to object to admissible evidence.

Contrary to Petitioner's assertion, Counsel did interview Petitioner's co-indictees prior to trial. He talked with them as extensively as he could without violating any ethical considerations. He had requested from their attorneys but was denied permission to talk with them at length.

Finally, Petitioner has cited several instances in which he claims Counsel was ineffective. These include the failure to obtain a psychiatric evaluation for an insanity defense and for mitigating evidence in the sentencing phase; the failure to prepare properly mitigating evidence; and the failure to present any character or background evidence in the sentencing phase. However, Petitioner has not shown that such evidence exists and would have been helpful at trial. For this reason, the Court cannot conclude Counsel was ineffective.

Accordingly, the claim for relief in paragraph 18 is found to be without merit.

19

In paragraph 19, Petitioner alleges that the prosecution improperly cross-examined Petitioner concerning the defense which Petitioner had asserted in a prior trial and thus violated Petitioner's constitutional rights.

The Supreme Court has already decided this issue

in that the Supreme Court [illegible]
adversely to Petitioner. Dick v. State, 246 Ga. at 706 (16).

20

cannot hold Counsel ineffective for failing to object

In paragraph 20, Petitioner contends his constitutional rights were violated by the admission into evidence of a prior conviction because the conviction is not a statutory aggravating circumstance under Ga. Code Ann. §27-2534.1(b).

FINDINGS OF FACT

Petitioner admitted the prior conviction for statutory rape on direct examination in the guilt/innocence phase of trial in an effort to show the jury he had not been convicted of a crime of violence. Dick v. State, 246 Ga. at 706(16) and (17).

CONCLUSIONS OF LAW

Prior convictions are admissible in the presentence hearing in capital cases under Ga. Code Ann. §27-2503, provided the State has given notice to the defendant of its intent to use the prior convictions as evidence. Corn v. Hopper, 244 Ga. 28 (1979); Fair v. State, 245 Ga. 868, 873-74 (1980).

The record here is not clear whether Petitioner was given formal notice by the State; however, the notice requirement would be inapplicable since Petitioner brought the prior conviction to the jury's attention.

Accordingly, the claim for relief in paragraph 20 is found to be without merit.

21

The Supreme Court has already concluded that certain jurors were not improperly excused under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Dick v. State, 246 Ga. at 700.

22-23

In paragraphs 22-23, Petitioner contends that he was denied his constitutional rights by the failure of the trial court to investigate sua sponte the issue of Petitioner's mental condition at the time of the offense, the confession, and trial, and that this failure precluded the development of mitigating evidence.

FINDINGS OF FACT

No special or general plea of insanity was filed. Dick v. State, 246 Ga. at 703.

CONCLUSIONS OF LAW

Petitioner has made no showing of any circumstances which would have warranted sua sponte action by the trial court or any mitigating evidence that could have resulted therefrom.

Accordingly, this claim for relief is found to be without merit.

24

In paragraph 24, Petitioner alleges that he was denied due process and equal protection of the law by the trial court berating and admonishing defense counsel.

The Supreme Court has already decided this allegation adversely to Petitioner. Dick v. State, 246 Ga. at 701(4).

25

The Supreme Court has already concluded that the trial court did not abuse its discretion in denying the motion for a change of venue. Dick v. State, 246 Ga. at 699(1).

26-27

The Supreme Court has already concluded that the evidence in this case "overwhelmingly" supported a finding of guilt beyond a reasonable doubt. Dick v. State, 246 Ga. at 701(3).

28-29

In paragraphs 28-29, Petitioner claims his constitutional rights were violated by the prosecution's failure to disclose evidence favorable to the defense. Specifically, Petitioner alleges that the prosecution failed to disclose that the State had no corroborative evidence of the allegations that Petitoner had fired a second shot so that defense counsel was not alerted to the need for rebuttal forensic evidence.

The Court is unaware of any requirement that the prosecution disclose the nonexistence of exculpatory evidence to defense counsel. Moreover, Petitioner has failed to demonstrate how such evidence would have been helpful.

Accordingly, this claim for relief is found to be without merit.

30-32

In paragraphs 30-32, Petitioner contends that the death penalty is being applied arbitrarily and capriciously, that it is being exacted pursuant to a pattern and practice of Georgia officials to discriminate, and that there are no theoretical justifications for its imposition.

The Court finds these allegations to be without merit.

Petitioner's "prosecution-prone" argument was rejected in Smith v. Balkcom, 660 F.2d 573 (Former 5th Cir. 1981).

WHEREFORE, all claims for relief having been found to be without merit, the Petition is hereby denied.

SO ORDERED, this 1st day of November, 1982.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURT
FLINT JUDICIAL CIRCUIT

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

DENNIS DICK,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	FILE NO. 5515
	:	
ROBERT O. FRANCIS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ADDENDUM

Hearing in this habeas corpus case was held on October 14, 1982, and relief was denied on November 1, 1982. Upon consideration of Petitioner's application for certificate of probable cause, the Supreme Court remanded the case to this Court for the purpose of receiving testimony of Chris Hoerner relative to any matter material to the petition. Further hearing was held by this Court on March 14, 1983, at which time the testimony of Chris Hoerner was received. The Court will review its decision in light of the testimony of Chris Hoerner.

14-16

In paragraphs 14-16 of the petition, Petitioner had contended that the denial of his extraordinary motion for new trial violated his Sixth, Eighth, and Fourteenth Amendment rights and rights under the Georgia Constitution.

CONCLUSIONS OF LAW

It is still clear that Counsel for Petitioner has not satisfied the third requirement for the grant of a new trial: that the evidence was so material that it would probably produce a different verdict. Bell v. State, 227 Ga. 800, 805 (1971).

At the October 14, 1982, hearing, Co-Defendant Billy Webster testified that Co-Defendant Chris Hoerner told Webster that he gave Petitioner some type of drug, without Petitioner's knowledge, on the night of the incident. Webster did not see Hoerner give Petitioner the pills and did not know what the pills were.

At the March 14, 1983, hearing, Chris Hoerner admitted dropping 1 or 2 blue-and-white capsules in Petitioner's beer without Petitioner's knowledge. Hoerner, however, did not know what the capsules were. He obtained them as partial payment in a deal with someone else. Hoerner admitted the capsules could have been a controlled substance or a non-controlled substance - i.e., anything.

Counsel for Petitioner has not demonstrated that the newly discovered evidence of alleged involuntary intoxication would probably produce a different verdict. Petitioner by his own admission had been drinking on the day in question. Hoerner did not know what the capsules were that he put in Petitioner's beer. Thus, the impact of the unknown substance when coupled with Petitioner's alcohol consumption is speculative.

Petitioner has also claimed that trial counsel was ineffective for failing to raise this issue of involuntary intoxication at trial. Webster did not come forward with

his evidence until some two years after Petitioner's trial. Hoerner testified that he did not tell Petitioner's lawyer about the pills at the time of the trial because he was mad at Petitioner and "wanted him to get the hot seat." Trial counsel Max Davis testified that he interviewed Webster and Hoerner as extensively as he could without violating any ethical considerations. Their lawyers denied him permission to talk with Webster and Hoerner at length. Thus, the Court cannot find trial counsel was ineffective for failing to advance a defense about which he knew nothing.

Accordingly, the claim for relief in paragraphs 14-16 is found to be without merit.

WHEREFORE, all claims for relief having been found to be without merit, the petition is hereby denied.

SO ORDERED, this 6th day of April, 1983.

Hal Craig

HAL CRAIG
JUDGE, SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

SUPREME COURT OF GEORGIA

ATLANTA, June 1, 1983

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DENNIS DICK V. ROBERT FRANCIS, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, C.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

RESPONDENT'S APPENDIX 4